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SUPREME COURT OF THE UNITED STATES

No. 94-1039

ROY ROMER, GOVERNOR OF COLORADO, et al.,
PETITIONERS v. RICHARD G. EVANS et al.
on writ of certiorari to the supreme court
of colorado
[May 20, 1996]

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a -`bare . . . desire to harm'- homosexuals, ante, at 13, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick, 478 U. S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that -animosity- toward homosexuality, ante, at 13, is evil. I vigorously dissent.

I

Let me first discuss Part II of the Court's opinion, its longest section, which is devoted to rejecting the State's arguments that Amendment 2 -puts gays and lesbians in the same position as all other persons,- and -does no more than deny homosexuals special rights,- ante, at 4. The Court concludes that this reading of Amendment 2's language is -implausible- under the -authoritative construction- given Amendment 2 by the Supreme Court of Colorado. Ibid.

In reaching this conclusion, the Court considers it unnecessary to decide the validity of the State's argument that Amendment 2 does not deprive homosexuals of the -protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings.- Ante, at 8. I agree that we need

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not resolve that dispute, because the Supreme Court of Colorado has resolved it for us. In Evans v. Romer, 882 P. 2d 1335 (1994), the Colorado court stated:
-[I]t is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age, 24-34-402(1)(a), 10A C. R. S. (1994 Supp.); marital or family status, 24-34-502(1)(a), 10A C. R. S. (1994 Supp.); veterans' status, 28-3-506, 11B C. R. S. (1989); and for any legal, off-duty conduct such as smoking tobacco, 24-34-402.5, 10A C. R. S. (1994 Supp.). Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.- Id., at 1346, n. 9 (emphasis added).
The Court utterly fails to distinguish this portion of the Colorado court's opinion. Colorado Rev. Stat. 24-34-402.5 (Supp. 1995), which this passage authoritatively declares not to be affected by Amendment 2, was respondents' primary example of a generally applicable law whose protections would be unavailable to homosexuals under Amendment 2. See Brief for Respondents Evans et al. 11-12. The clear import of the Colorado court's conclusion that it is not affected is that -general laws and policies that prohibit arbitrary discrimination- would continue to prohibit discrimination on the basis of homosexual conduct as well. This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horribles, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted. The amendment prohibits special treatment of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the -life partner- of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

Despite all of its hand-wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the Court's opinion ultimately does not dispute all this, but assumes it to be true. See ante, at 9. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain

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preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged -equal protection- violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature-unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard-of.

The Court might reply that the example I have given is not a denial of equal protection only because the same -rational basis- (avoidance of corruption) which renders constitutional the substantive discrimination against relatives (i.e., the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the electoral-procedural discrimination against them (i.e., the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why -electoral-procedural discrimination- has not hitherto been heard of: a law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something special-something that cannot be justified by normal -rational basis- analysis-in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

II

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment-for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's

preferential treatment under the laws, has been denied equal protection of the laws. It merely starting into an equal equal protection which does not violate the rights, but constitutional jurisprudence has accepted constant attitudes.

The central theme of the Court's reasoning is that any group is denied equal protection when, to obtain advantage for, presumably, to avoid disadvantage, it must have recourse to a more general and hence more difficult level of politics decision-making than others. The world has never heard of such a contention, which is why the Court's opinion is so long on moving adjectives and so short on relevant legal citation. And it comes to mean, most curiously that any majoritarian democracy can function under such a principle. For whenever a disadvantage is imposed, or conferred or a benefit is withheld, as one of the right levels of democratic decision-making (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this novelty) been denied equal protection. The law is a whole of a piece, consider a state law prohibiting the sale of municipal bonds to negroes or Jews or any citizens. Under such a law is passed, the group composed of such relatively small, in point of the bonds, is only contents, because the state legislature-in all other matters, who moreover possesses the monopoly. It is fantastic to consider this a denial of equal protection which is why the Court's theory is unsound.

The Court might reply that the example I have given is not a denial of equal protection only because the same relevant basis, availability of correspondingly which reflects constitutional the substantive attitude against [illegible] i.e., the fact that they alone [illegible] contrary also [illegible] to [illegible] be called the [illegible] attention [illegible] i.e., the fact that they must go to the state level to get this [illegible]. This is to [illegible] [illegible] response, and would [illegible] [illegible] classification the [illegible] [illegible] [illegible]

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opinion: In Bowers v. Hardwick, 478 U. S. 186 (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years-making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling Bowers, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling, Tr. of Oral Arg. 53. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: -If the Court [in Bowers] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.- Padula v. Webster, 822 F. 2d 97, 103 (1987).) And a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter Bowers with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual -orientation.- Some courts of appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference. See Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, 54 F. 3d 261, 267 (CA6 1995) (-[F]or purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct-); Steffan v. Perry, 41 F. 3d 677, 689-690 (CADC 1994). The Supreme Court of Colorado itself appears to be of this view. See 882 P. 2d, at 1349-1350 (-Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons-) (emphasis added).

But assuming that, in Amendment 2, a person of homosexual -orientation- is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, Bowers still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed,

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where criminal sanctions are not involved, homosexual -orientation- is an acceptable stand-in for homosexual conduct. A State -does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect,- Dandridge v. Williams, 397 U. S. 471, 485 (1970). Just as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because some methadone users pose no threat to passenger safety, see New York City Transit Authority v. Beazer, 440 U. S. 568 (1979), and just as a mandatory retirement age of 50 for police officers does not violate equal protection even though it prematurely ends the careers of many policemen over 50 who still have the capacity to do the job, see Massachusetts Bd. of Retirement v. Murgia, 427 U. S. 307 (1976) (per curiam), Amendment 2 is not constitutionally invalid simply because it could have been drawn more precisely so as to withdraw special antidiscrimination protections only from those of homosexual -orientation- who actually engage in homosexual conduct. As Justice Kennedy wrote, when he was on the Court of Appeals, in a case involving discharge of homosexuals from the Navy: -Nearly any statute which classifies people may be irrational as applied in particular cases. Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational.- Beller v. Middendorf, 632 F. 2d 788, 808-809, n. 20 (CA9 1980) (citation omitted). See also Ben-Shalom v. Marsh, 881 F. 2d 454, 464 (CA7 1989), cert. denied, 494 U. S. 1004 (1990).

Moreover, even if the provision regarding homosexual -orientation- were invalid, respondents' challenge to Amendment 2-which is a facial challenge-must fail. -A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.- United States v. Salerno, 481 U. S. 739, 745 (1987). It would not be enough for respondents to establish (if they could) that Amendment 2 is unconstitutional as applied to those of homosexual -orientation-; since, under Bowers, Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed. Some individuals of homosexual -orientation- who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person. See App. 4-5 (complaint describing each of the individual respondents as either -a gay man- or -a lesbian-).

III

The foregoing suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with

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close, congressionally approved precedent in earlier constitutional practice.

First, as to its eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of -animus- or -animosity- toward homosexuality, as though that has been established as Unamerican. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible-murder, for example, or polygamy, or cruelty to animals-and could exhibit even -animus- toward such conduct. Surely that is the only sort of -animus- at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons-for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct-that is, it prohibits favored status for homosexuality.

But though Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled -gay-bashing- is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. See 1971 Colo. Sess. Laws, ch. 121, 1. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae in Bowers v. Hardwick, O. T. 1985, No. 85-140, p. 25, n. 21 (antisodomy statutes are -unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources-); Kadish, The Crisis of Overcriminalization, 374 The Annals of the American Academy of Political and Social Science 157, 161 (1967) (-To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution-).

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable -alternate life style.- The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in

cases, constitutionally approved precedent in earlier constitutional practice.

First, as to its evident reasonableness, the Court's opinion contains what, analyzing what the colonists have been guilty of -animus- or -animosity- toward homosexuality, as though that has been established as immoral. Of course it is our moral heritage that one should not take any human being or class of human beings. But I was taught that one could consider certain conduct impermissible-perverse, for example, or polygamy, or cruelty to animals-and could exhibit even -animus- toward such conduct. Surely that is the-only sort of -animus- we argue being moral disapproval of commercial conduct. The late Sir of moral disapproval that distinguish the religious and criminal laws from the held constitutional in Bowers. The majority emphasized that, to quote authority precisely, protect giving favored status to people who are homosexuals they can be favored for many reasons-for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct-that is, it prohibits favored status for homosexuality.

But though colonists are, as I say, entitled to be hostile towards homosexual conduct, the law is that the degree of quantity imposed by Amendment I is the smallest discernable. The court's description of Georgia as a specially taken victim to punitive, self-flattering-as to false as to be comical. Colorado not only is one of the 25 states that have repealed their sodomy law, but was among the first to do so. See 1971 Colo. Sess. Laws, ch. 121, 1. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially undesirable, abolition simply reflects the view that enforcement of such criminal laws involves unwanted intrusion into the intimate lives of citizens. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., et al., as Amici Curiae in Bowers v. Hardwick, O. T. 1985, No. 85-140, p. 25, n. 21 (analogous statutes are -unenforceable by any but the most orthodox accepting and extended application of law enforcement resources-). The Office of Investigation, 3 The Annals of the American Academy of Political and Social Science 191 (1893) (-No certain evidence (in sodomy cases), police are assigned to search for perverts which tends to degrade and demean both the-involve personally and are unnecessary as an institution).

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news. In Bowers political figures giggled even when referring to the incarceration that local sheriffs of books regarding that homosexuality is an original and fully acceptable -alternate-life-like style.- The problem is problem, that is, for those who wish to retain social disapprobation of homosexuality as that, because those who engage in

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homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see ibid.; App. 254 (affidavit of Prof. James Hunter), and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See, e.g., Jacobs, The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991, 72 Neb. L. Rev. 723, 724 (1993) (-[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation-).

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities-Aspen, Boulder, and Denver-had enacted ordinances that listed -sexual orientation- as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. See Aspen Municipal Code 13-98 (1977); Boulder Rev. Municipal Code 12-1-1 to 12-1-11 (1987); Denver Rev. Municipal Code, Art. IV 28-91 to 28-116 (1991). The phenomenon had even appeared statewide: the Governor of Colorado had signed an executive order pronouncing that -in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form,- and directing state agency-heads to -ensure non-discrimination- in hiring and promotion based on, among other things, -sexual orientation.- Executive Order No. D0035 (Dec. 10, 1990). I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never happened before.

-[Amendment 2] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive . . . .

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-It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.-
Ante, at 11-12.
As I have noted above, this is proved false every time a state law prohibiting or disfavoring certain conduct is passed, because such a law prevents the adversely affected group-whether drug addicts, or smokers, or gun owners, or motorcyclists-from changing the policy thus established in -each of [the] parts- of the State. What the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition locally or through state legislation, but even of the power to alter it through state constitutional amendment or federal legislation. The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.

But there is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is -forever prohibited.- See Ariz. Const., Art. XX, par. 2; Idaho Const., Art. I, 4; N. M. Const., Art. XXI, 1; Okla. Const., Art. I, 2; Utah Const., Art. III, 1. Polygamists, and those who have a polygamous -orientation,- have been -singled out- by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis-unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

The United States Congress, by the way, required the inclusion of these antipolygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah, as a condition of their admission to statehood. See Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108. (For Arizona, New Mexico, and Utah, moreover, the Enabling Acts required that the antipolygamy provisions be -irrevocable without the consent of the United States and the people of said State--so that not only were -each of [the] parts- of these States not -open on impartial terms- to polygamists, but even the States as a whole were not; polygamists would have to persuade the whole country to their way of thinking.) Idaho

It is not within our constitutional tradition to enact laws of this sort. Certainly not in the idea of the rule of law and in our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on important terms to all who seek its assistance.—

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As I have noted above, this is proved false every time a state law prohibiting or disavowing cohabitation is passed, because such a law operates the adversely affected group—whether drug addicts, or smokers, or gun owners, or motorcyclists—from enjoying the policy that established in each of (the) 50 states. Yet what the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition locally or through state legislation, but even of the power to alter it through state constitutional amendment or federal legislation. The Establishment Clause of the First Amendment disavows Congress from taking their way by conferring their favorite religion on the local, state, or federal authority lawfully as does the Republican form of government Clause prevent monarchists.

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adopted the constitutional provision on its own, but the 51st Congress, which admitted Idaho into the Union, found its constitution to be -republican in form and . . . in conformity with the Constitution of the United States.- Act of Admission of Idaho, 26 Stat. 215 (emphasis added). Thus, this -singling out- of the sexual practices of a single group for statewide, democratic vote-so utterly alien to our constitutional system, the Court would have us believe-has not only happened, but has received the explicit approval of the United States Congress.

I cannot say that this Court has explicitly approved any of these state constitutional provisions; but it has approved a territorial statutory provision that went even further, depriving polygamists of the ability even to achieve a constitutional amendment, by depriving them of the power to vote. In Davis v. Beason, 133 U. S. 333 (1890), Justice Field wrote for a unanimous Court:

-In our judgment, 501 of the Revised Statutes of Idaho Territory, which provides that `no person . . . who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law . . . is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory,' is not open to any constitutional or legal objection.- Id., at 346-347 (emphasis added).

To the extent, if any, that this opinion permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has of course been overruled by later cases. See Brandenburg v. Ohio, 395 U. S. 444 (1969) (per curiam). But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law. See Richardson v. Ramirez, 418 U. S. 24, 53 (1974). Beason rejected the argument that -such discrimination is a denial of the equal protection of the laws.- Brief for Appellant in Davis v. Beason, O. T. 1889, No. 1261, p. 41. Among the Justices joining in that rejection were the two whose views in other cases the Court today treats as equal-protection lodestars-Justice Harlan, who was to proclaim in Plessy v. Ferguson, 163 U. S. 537, 559 (1896) (dissenting opinion), that the Constitution -neither knows nor tolerates classes among citizens,- quoted ante, at 1, and Justice Bradley, who had earlier declared that -class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment,- Civil Rights Cases, 109 U. S. 3, 24 (1883), quoted ante, at 14.

This Court cited Beason with approval as recently as 1993, in an opinion authored by the same Justice who writes for the Court today. That opinion said: -[A]d-verse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for

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reasons quite apart from discrimination. . . . See, e.g., . . . Davis v. Beason, 133 U. S. 333 (1890).- Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 535 (1993). It remains to be explained how 501 of the Idaho Revised Statutes was not an -impermissible targeting- of polygamists, but (the much more mild) Amendment 2 is an -impermissible targeting- of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a -legitimate concern of government,- and the perceived social harm of homosexuality is not?

IV

I strongly suspect that the answer to the last question is yes, which leads me to the last point I wish to make: The Court today, announcing that Amendment 2 -defies . . . conventional [constitutional] inquiry,- ante, at 10, and -confounds [the] normal process of judicial review,- ante, at 11, employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values. The Court's stern disapproval of -animosity- towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in Murphy v. Ramsey, 114 U. S. 15 (1885), rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

-[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.- Id., at 45.

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than -`a bare . . . desire to harm a politically unpopular group,'- ante, at 13, quoting Department of Agriculture v. Moreno, 413 U. S. 528, 534 (1973), is nothing short of insulting. (It is also nothing short of preposterous to call -politically unpopular- a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2, see App. to Pet. for Cert. C-18.)

When the Court takes sides in the culture wars, it

reasons quite apart from discrimination. . . . See, e.g., . . . Davis v. Bowen, 123 F. 2d 112 (1920). Cf. Union of Indian Ayes, Inc. v. Matsen, 500 U. S. 320, 328 (1991). It remains to be explained how 101 of the Indian Revised Statutes was not an "impermissible categorizing" of polygamists, but the point does not matter, because 2 is an "impermissible categorizing" of women-specials. Has the Court proclaimed that the protected social mean of polygamy is a "legitimate concern of government," and the protected social mean of monogamy is not?

-IV-

I strongly suspect that the Court's to see last "decision" is yes, which leads me to the last point I wish to make: the Court today, announcing what amounts to 2 "strong . . . conventional legislation" (majority, note, at 14), and "contemporary [and] mental practices of political culture," at 11, employs a constitutional theory heretofore unknown to invalidate Colorado's reasonable effort to preserve traditional American moral values. The Court's stern disapproval of "animosity" towards homosexuality might be compared with Chief an earlier Court lifetime-like the reverse: Justices Marian and Bradley said in Bowen v. Kennedy, 114 U. S. 14 (1920), proscribing a constitutional challenge to a United States statute that denied to Mormons in federal territories to those who engaged in polygamy "abominations."

Interestingly no legislation can be imposed such wickedness and necessary in the foundation of a state, all governing commonwealth, let us take back as one of the "co-ordinate states" of the union, that "Mormon" which is established as on the basis of one idea of the family, as contrasting in one principle from the union of life of men and of women in the body state of marriage, the sole foundation of all that is stable and pure in our civilization; the best guaranty of that important morality which is the source of all peaceful progress in social and political improvement. . . . Id., at 44.

I would not waste tangible on such civil laws for Mormonical monogamy, because I take it to be business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and sweeping constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than "a bare . . . desire to harm a politically unpopular group," note, at 14, quoting Department of Agriculture v. Moreno, 413 U. S. 528, 534 (1973), is nothing short of indulting. It is also nothing short of preposterous to call politically powerful - a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though comprising no more than 4% of the population had the support of 41% of the voters on Amendment 2, see App. to Pet. for Cert. C-16!

When the Court takes sides in the culture wars, it

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tends to be with the knights rather than the villeins--and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: -assurance of the employer's willingness- to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. 6-4(b); Executive Committee Regulations of the Association of American Law Schools 6.19, in 1995 Handbook, Association of American Law Schools. This law-school view of what -prejudices- must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, see, e.g., Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments of 1975, H. R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990, see 42 U. S. C. 12211(a) (1988 ed., Supp. V).

* * *

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

tends to be with the hatred rather than the validity and more specifically with the feelings, reflecting the views and values of the lawyer minus from which the Court's members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the District's law schools. The interviewer may refuse to offer a job because the applicant is a Republican because he is an agnostic, because he went to the wrong prep school or belongs to the wrong country club; because she wears braids because she is a woman; because she hates the Chicago Cubs. But if the interviewer asking with not to be an associate or partner of an gay lawyer be disqualified, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to ensure that job interviewers cease because employer's willingness to hire homosexuals. Values of the Association of American Law Schools, that's what's behind the courtesy resolutions of the Association of American Law Schools c.1a, in 1993 handbook, Association of American law schools. That law-school view of was -prejudices made be changed but may be constrained with the more pressing difficulties that privately still exists in the United states congress, which has been successfully to remove attempts to extend to women the rights provided by federal civil rights laws, e.g. Employment Non-discrimination act of 1994, S. 2238, 103d Cong., 2d sess. 1994; Civil rights Remedies Act of 1991, H. R. 2400, 102d Cong., 1st sess. (1991); and which that the price to pay for these than specifically from the American with Disabilities Act of 1990, 42 U. S. C. 12211 (d) (Lexis an.), Supp. V).

Today's opinion has no tendency in particular restrictive law, and private preferences to. The people of Colorado have adopted an entirely reasonable provision which does not even deprive homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent discrimination of the general morality imposed by majority or statutes, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Breaking it down as an act, not of judicial judgment, but of political will. I dissent.